

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Avery Mason,)	C/A No. 2:09-2044-JFA-RSC
)	
Petitioner,)	
v.)	ORDER
)	
Warden, Manning Correctional Institution,)	
)	
Respondent.)	
_____)	

The *pro se* petitioner filed this action seeking relief under 28 U.S.C. § 2254. He alleges an excessive delay by the South Carolina Court of Appeals in determining his direct appeal.

The Magistrate Judge assigned to this action¹ has prepared a thorough Report and Recommendation and opines that the petition should be summarily dismissed because the petitioner has not exhausted his administrative remedies. The Report sets forth in detail the relevant facts and standards of law on this matter, and the court incorporates such without a recitation.

The petitioner was advised of his right to file objections to the Report and Recommendation which was entered on the docket on August 20, 2009. The deadline has

¹ The Magistrate Judge's review is made in accordance with 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02. The Magistrate Judge makes only a recommendation to this court. The recommendation has no presumptive weight, and the responsibility to make a final determination remains with the court. *Mathews v. Weber*, 423 U.S. 261 (1976). The court is charged with making a *de novo* determination of those portions of the Report and Recommendation to which specific objection is made, and the court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge, or recommit the matter to the Magistrate Judge with instructions. *See* 28 U.S.C. § 636(b)(1).

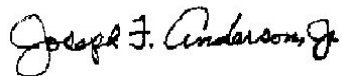
expired and the petitioner has failed to respond.

The Magistrate Judge correctly opines that this case should be summarily dismissed because the petitioner currently has an appeal pending in state court regarding his state criminal conviction. Because his appeal is pending, the grounds petitioner could raise in a § 2254 petition have not been exhausted as is required under 28 U.S.C. § 2254(b). *Picard v. Connor*, 404 U.S. 270 (1971). Furthermore, the Magistrate Judge notes that the delay that petitioner complains of (22 months since he filed his direct appeal) does not rise to the level of the delay which could render the state court remedies ineffective.

After a careful review of the record, the applicable law, and the Report and Recommendation, the court finds the Magistrate Judge's recommendation to be proper and incorporates the Report herein by reference. Accordingly, the petition is dismissed without prejudice and without issuance and service of process.

IT IS SO ORDERED.

September 10, 2009
Columbia, South Carolina



Joseph F. Anderson, Jr.
United States District Judge